Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1998

RICHARD FUSCO,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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27 pp

QUESTION PRESENTED

After allocuting a guilty plea but prior to the trial court's acceptance of such plea, may a defendant withdraw the plea –

for "any fair and just reason" under Federal Rule of Criminal Procedure 32(e), or

for any reason at all, or

is the defendant barred from withdrawing the plea until acceptance by the court?

PARTIES

The parties in the court below were the United States of America, Appellee, against Theodore Persico, Robert Zambardi, and Richard Fusco, Defendants-Appellants.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

Richard Fusco,

PETITIONER,

v.

United States of America,

RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Petitioner Richard Fusco respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

REPORTED OPINIONS BELOW

The opinion of the court of appeals is reported at 164 F.3d 796 (2d Cir. 1999).

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its judgment on January 15, 1999. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

An order denying rehearing by one of the parties was issued April 6, 1999.

STATUTORY PROVISIONS INVOLVED

Federal Rules of Criminal Procedure Rule 32(e):

> **Plea Withdrawal.** If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

Federal Rules of Criminal Procedure Rule 11(e):

> **Plea Agreement Procedure.**
>
> (1) **In General.** The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:
>
> (A) move for dismissal of other charges; or
>
> (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) **Notice of Such Agreement.** If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) **Acceptance of a Plea Agreement.** If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) **Rejection of a Plea Agreement.** If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) **Time of Plea Agreement Procedure.** Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) **Inadmissibility of Pleas, Plea Discussions, and Related Statements.** Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

STATEMENT OF THE CASE

Petitioner Richard Fusco was indicted on federal racketeering and other charges on May 14, 1993. More than a year later, on May 20, 1994, he allocuted a guilty plea pursuant to an agreement reached with the government under F.R.Cr.P. 11(e)(1)(c), which specified the sentence agreed on at 14 years of imprisonment. The trial court stated that it would not "accept the plea or reject it, at this point[.]" The court found that "there is a factual basis for it, and that it's voluntary" and deferred acceptance of the plea until the date for sentencing. Then the court sent the Petitioner to the Bureau of Prisons medical facility in Rochester Minnesota "for study and report."

Petitioner did not appear in court again until some 40 months later, in November 1997. In the interim, his health deteriorated dramatically as a result of new conditions of cancer and heart disease. On November 13, 1997 Petitioner filed a written motion to withdraw his guilty plea pursuant to F.R.Cr.P. 32(e) on the grounds of "changed circumstances." Included in the motion were citations to contract law and medical reports demonstrating and concluding that his health had deteriorated so much that he would not survive the agreed-upon sentence.

The court declined to discuss the plea withdrawal motion in terms of the Rule 32(e) standard, which permits withdrawal of a guilty plea for "any fair and just reason" at any time prior to sentencing. Instead, the court directed the parties to prepare sentencing submissions, also disregarding the fixed nature of F.R.Cr.P 11(e)(1)(c) pleas or the need to withdraw the plea prior to considering alternative sentencing options. The court then concluded that it was "unable to depart from the low end of the guidelines that apply" and sentenced petitioner to 168 months imprisonment.

Petitioner appealed. He argued that plea withdrawal should have been granted and that by treating the Rule 32(e)

motion as a motion for downward departure, the court applied the wrong standard for withdrawing the guilty plea. The government argued that the motion for withdrawal was actually a motion for downward departure based on Petitioner's deteriorating health. The Second Circuit agreed with the government, ruling that because "[t]he plea and the plea agreement had not yet been accepted when Fusco made his application[, a] Rule 32(e) plea withdrawal motion was technically not available."

REASONS FOR GRANTING THE WRIT

In *United States v. Hyde*, 520 U.S. 670, 117 S.Ct. 1630 (1997), this Court granted certiorari to the Ninth Circuit to address a related but distinct issue to the one at bar. In that case, the lower court had accepted a guilty plea, but had not yet accepted the plea agreement. Resolving a split in the circuits, the Supreme Court ruled that in such circumstances, the withdrawal of the guilty plea is governed by Rule 32(e)'s "fair and just reason" standard. It left open the question of whether such a standard also applied to the withdrawal of guilty pleas that are allocuted, but not yet accepted by the court.

Since *Hyde* a similar split in the circuits has emerged on this important issue. The Ninth Circuit has retained and reiterated its rule that a guilty plea may be withdrawn for any reason at all prior to acceptance by the court. *See United States v. Alvarez-Tautimez*, 160 F.3d 573, 576 (9th Cir. 1998) (the defendant "had the absolute right to withdraw his plea before it was accepted by the district court."), *citing United States v. Washman*, 66 F.3d 210 (9th Cir. 1995).

The Fifth Circuit has adopted precisely the opposite approach, holding that the Rule 32(e) standard applies before the guilty plea is accepted by the court. *See United States v. Grant*, 117 F.3d 788, 790 (5th Cir. 1997) ("Rule 32(e)'s 'fair and just reason' standard was triggered upon entry of [the defendant's] plea[.]"). At least one district court has adopted

the Fifth Circuit's rule, applying the "fair and just reason" standard to pre-acceptance pleas. *See United States v. Allen*, 981 F.Supp. 564 (N.D. Iowa 1997).

In the case at bar, the Second Circuit has fashioned yet a third rule. In ruling that Rule 32(e) plea withdrawal was "not available" prior to acceptance of the guilty plea by the court, the appeals court appears to be indicating that it would not permit a district court to consider withdrawal of the guilty plea prior to acceptance under *either* standard, ignoring the express terms of defendant's motion for withdrawal and the Ninth Circuit view.

There are numerous instances in addition to cases like the instant one in which guilty pleas are allocuted but their acceptance by the court may be delayed. For example, guilty pleas are increasingly allocuted before magistrate judges while acceptance by the District Judge is postponed for later review of the transcripts. *See, e.g., United States v. Williams*, 23 F.3d 629, 632-633 (2d Cir. 1994) (approving the practice under the Federal Magistrate Act); and *United States v. Washman*, 66 F.3d 210 (9th Cir. 1995).

However, as the split in the circuits and the ruling in this case indicate, the courts are divided and confused over what standard to apply when the defendant chooses to withdraw his plea before it is accepted by the court. With the district courts ordering 52,174 presentence reports in fiscal year 1997, there is every reason to believe the problem occurs with alarming frequency. *See Judicial Caseload Indicators* (Administrative Office of the U.S. Courts News Release, March 10, 1998). The Second Circuit's misapplication of the Federal Rules of Criminal Procedure in this case can only have resulted from the ongoing confusion created by this open legal question. Whichever way this case comes out, a clear statement now from the Supreme Court would save enormous judicial resources by clarifying the process by which guilty pleas are withdrawn after allocution but prior to judicial acceptance.

CONCLUSION

This court should grant a writ certiorari in order to resolve the split in the circuit courts and correct the erroneous statement of law applied in this case.

Respectfully Submitted,

Marvin B. Segal
Member of the Bar of the
Supreme Court of the United States,
Attorney for Petitioner
Richard Fusco

Bennett M. Epstein
Of Counsel

Dated: May 19, 1999

APPENDIX A

[Decision of the Second Circuit Court of Appeals]

United States Court of Appeals

for the Second Circuit

August Term 1998

Argued: September 3, 1998

Decided: January 15, 1999

Docket Nos. 97-1456L, -1457, 98-1008CON

UNITED STATES OF AMERICA,

Appellee,

v.

THEODORE PERSICO,
ROBERT ZAMBARDI, and
RICHARD FUSCO,

Defendants-Appellants.

Before: NEWMAN, CARDAMONE, and PARKER, *Circuit Judges*.

Appeals from judgments of the United States District Court for the Eastern District of New York (Charles P. Sifton, Chief Judge) convicting appellants, after trial (Persico) and upon guilty pleas (Zambardi and Fusco), of racketeering offenses

and denying motions to dismiss the indictment or for new trial.

Affirmed.

Barry M. Fallick, New York, N.Y. (Bobbi C. Sternheim, Rochman Platzer Fallick & Sternheim, New York, N.Y., on the brief), for defendant-appellant Persico.

Herald Price Fahringer, New York, N.Y. (Erica T. Dubno, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, New York, N.Y.; James R. Froccaro, Jr., Garden City, N.Y., on the brief), for defendant-appellant Zambardi.

Bennett M. Epstein, New York, N.Y. (Marvin B. Segal, Crocco & De Maio, New York, N.Y., on the brief), for defendant- appellant Fusco.

George A. Stamboulidis, Asst. U.S. Atty., Brooklyn, N.Y. (Zachary W. Carter, U.S. Atty., David C. James, Ellen M. Corcella, Andrew Weissmann, Asst. U.S. Attys., Brooklyn, N.Y., on the brief), for appellee.

JON O. NEWMAN, *Circuit Judge*:

These appeals by three defendants who participated in a street war between factions of an organized crime family primarily present issues arising from the Government's failure, before trial, to disclose both the informant role of a co- conspirator and aspects of an FBI agent's allegedly outrageous conduct in dealing with the informant. In particular, we are required to apply the standard for granting

a motion to withdraw a guilty plea, after conviction but before sentencing, on the ground of newly discovered *Brady/Giglio* material. These issues arise on appeals from judgments of the District Court for the Eastern District of New York (Charles P. Sifton, Chief Judge) convicting Theodore Persico, Richard Fusco, and Robert Zambardi of racketeering offenses.

Persico was convicted, after a ten-week jury trial, of racketeering and racketeering conspiracy, conspiracy to commit murder in aid of racketeering, loansharking, and carrying a firearm in connection with crimes of violence. Fusco was convicted, on a plea of guilty, of racketeering conspiracy. Zambardi was convicted, also on a plea of guilty, of a substantive count of racketeering. Fusco and Zambardi challenge the denial of their motions to withdraw their guilty pleas. Persico and Zambardi seek dismissal of the indictment because of allegedly outrageous government misconduct, or, alternatively, a new trial for Persico and an initial trial for Zambardi. Persico also seeks reversal of his firearms conviction, as well as a remand for resentencing because of an allegedly insufficient sentencing proceeding. We affirm the judgments in all respects.

Background

The charges and the Persico trial. The charges in this case arose from an internal war between the Persico and the Orena factions of the Colombo organized crime family, which was fought on the streets of New York City from mid-1991 through the end of 1994. The war was the subject of numerous indictments and has already precipitated several decisions of this Court, which recount its complex details.[1]

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[1] *See* United States v. Orena, 145 F.3d 551 (2d Cir. 1998); United States v. Malpeso, 115 F.3d 155 (2d Cir. 1997); United States v. Orena, 32 F.3d

Appellant Persico, the brother of the Colombo family boss, Carmine Persico, Jr., was a member of the Persico faction. He was tried in this case with four other members of that faction, Joseph and Anthony Russo (hereinafter "the Russos"), Joseph Monteleone, and Lawrence Fiorenza. Appellants Fusco and Zambardi, who pled guilty, were also members of the Persico faction.

The trial focused on a conspiracy among members of the Persico faction to murder members of the Orena faction and on three murders of Orena faction members that occurred during the conspiracy: John Minerva and Michael Imbergamo, killed in one incident, and Lorenzo Lampesi, killed separately. Evidence was also presented showing many other incidents in which one or more of the defendants plotted or attempted to kill members of the Orena faction.

The proof consisted largely of the testimony of four cooperating accomplice witnesses: Carmine Sessa (the former consigliere of the Colombo family's Persico faction), Lawrence Mazza, Joseph Ambrosino (both lower-level soldiers in the Persico faction), and Salvatore Miciotta (a soldier in the Orena faction). These witnesses all testified from their personal knowledge of the conspiracy and the murders, and the defendants' participation in them. Their testimony was corroborated by tape-recorded conversations, law enforcement surveillances, and evidence seized through lawful searches.

Persico's defense consisted mainly of attacks on the credibility of the Government witnesses. Persico attempted to show that he was not involved in a conspiracy to murder and that there was no real war at all, but only a series of personal

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704 (2d Cir. 1994); United States v. Brady, 26 F.3d 282 (2d Cir. 1994); United States v. Amato, 15 F.3d 230 (2d Cir. 1994); United States v. Orena, 986 F.2d 628 (2d Cir. 1993).

vendettas of Sessa and Gregory Scarpa, Sr., a soldier in the Persico faction, who is the central figure in the claim of outrageous government conduct discussed below. In one claim relevant to this appeal, Persico contended that he never carried a firearm to his meetings with the other members of the faction. He conceded that he was a member of the Colombo family and that he might be guilty of usury, but claimed that there was no evidence of violence or the threat of violence when he extended or collected loans. When the Government showed that he had been bringing messages from the imprisoned family boss, his brother Carmine, Persico claimed that the messages counseled "peace." The jury found Persico guilty of racketeering, 18 U.S.C. § 1962(c), racketeering conspiracy, 18 U.S.C. § 1962(d), conspiracy to murder in aid of racketeering, 18 U.S.C. § 1959(a)(5), loan-sharking conspiracy, 18 U.S.C. §§ 892, 894, and carrying a firearm in connection with crimes of violence, 18 U.S.C. § 924(c)(1).

The Scarpa disclosure. After Persico's trial, the Government made several disquieting disclosures concerning Scarpa, the Persico faction member who had been identified at trial as a target of an assassination attempt by the Orena faction. First, the Government acknowledged that for many years Scarpa had been an informant for the FBI. Second, it was disclosed that Scarpa had lied about or misrepresented his own involvement in some of the murders occurring during the intra-family war and had falsely attributed some of these murders to others. Finally, it was disclosed that Scarpa's "handling" FBI agent, R. Lindley DeVecchio, might have improperly given Scarpa sensitive FBI information that would have helped him wage war against the Orena faction and also avoid the arrest of himself and others. *See United States v. Orena*, 145 F.3d 551 (2d Cir. 1998).

Following the disclosures, Persico and his four trial co-defendants supplemented their previously filed motions for a new trial. In essence, they claimed that the prosecution had violated its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, by failing to disclose exculpatory evidence that Scarpa was an informant. They argued that (1) because Scarpa was an informant, his out-of-court statements should not have been admitted as co-conspirator hearsay, (2) the Scarpa hearsay and its misrepresentations so permeated and tainted the proceedings as to undermine confidence in the verdict, (3) certain material in the FBI reports concerning Scarpa could have been used to impeach the credibility of the out-of-court declarations, and (4) in dealing with Scarpa, DeVecchio had engaged in "outrageous conduct" requiring the dismissal of the indictments.[2] The District Court granted the motion for a new trial of the Russos, except as to the loan-sharking convictions, and granted the motion of Monteleone (who was not charged with loan-sharking) in its entirety. The Court denied the motions of Persico and Fiorenza.

Chief Judge Sifton found that certain statements made by Scarpa to DeVecchio, undisclosed by the Government before trial, could have been used to impeach the out-of-court statements of Scarpa that were admitted as co-conspirator statements. The undisclosed impeachment material that the District Court found mandated a new trial as to the Russos and Monteleone were statements Scarpa made to the FBI "in which Scarpa blame[d] other members of the Persico faction for murders he indisputably committed." *United States v.*

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[2] Motions on similar grounds were made before Judge Weinstein after the convictions of Victor Orena and Pasquale Amato, members of the Orena faction. Judge Weinstein denied the motions in their entirety. *See Orena v. United States*, 956 F. Supp. 1071 (E.D.N.Y. 1997), *aff'd*, __ F.3d __ (2d Cir. 1998) (table).

Persico, No. CR-92-0351, 1997 WL 867788, at *33 (E.D.N.Y. Mar. 13, 1997). As Chief Judge Sifton explained:

> While I remain confident that the jury was correct in finding that [the Russos and Monteleone] were members of the criminal enterprise described in the indictment and participated in the conduct of the affairs of that enterprise by joining in the Persico war, I am not confident that the jury would have found that they did so by engaging in the specific pattern of racketeering activity with which they were charged, namely, a pattern which included the murders of Minerva and Imbergamo. After a review of the Scarpa 209s released by the government, my confidence in the verdict of guilty on these counts is substantially undermined, and a new trial is ordered as to these defendants.

Id. On the Government's appeal of the decision awarding new trials to the Russos and Monteleone, this Court reversed. *See Orena*, 145 F.3d at 560-61.

As noted, the District Court denied Persico's motion for a new trial. Chief Judge Sifton's rationale included the following:

> The record is replete with evidence that Theodore Persico conspired with others, including Sessa and Ambrosino, to plan murders separate and apart from those perpetrated by Scarpa or in which he had any hand. Thus, evidence of Persico's overt plotting to kill Cutolo and others is wholly unperturbed by the revelations of Scarpa's other activities. Given the substantial evidence in the record relating Theodore Persico's

> attendance at meetings to discuss the war, his travels to visit his brother Carmine to pass along messages of support, and his own active efforts to plan and participate in murders, I conclude that the evidence relating to Scarpa's involvement with DeVecchio and the FBI, taken in its entirety, had no reasonable probability of altering a jury's finding that Theodore Persico was guilty of conspiracy to murder. Nothing in the disclosed 209 reports undermines confidence in Theodore Persico's involvement in these crimes.

Persico, 1997 WL 867788, at *32.

After denial of his post-trial motion, Persico received a sentence that included 210 months plus a consecutive term of 60 months on the firearms charge.

Zambardi's guilty plea. Zambardi was originally charged in five counts of the indictment with substantive and conspiracy RICO violations, conspiracy to murder, using and carrying a firearm in connection with the murder conspiracy, loan-sharking conspiracy, and possession of a firearm by an ex-felon. At the start of Persico's trial, Zambardi pled guilty to one count of racketeering, 18 U.S.C. § 1962(c), pursuant to a plea agreement stipulating to a 15-year term of imprisonment. If convicted on all counts, Zambardi would have faced life imprisonment.

Following the disclosure of Scarpa's role as an informant, Zambardi moved to withdraw his plea. He relied on *Brady* and its progeny, and also alleged that the Government had engaged in "outrageous conduct." Zambardi claimed that if he had known these newly disclosed facts, he would not have pled guilty.

The District Court denied the motion, finding that the evidence against him was overwhelming. The Court also

analyzed the legitimate use that Zambardi might have made of the newly disclosed information and concluded that it would have been immaterial to Zambardi's trial and to his decision to plead guilty, because there was ample direct evidence against Zambardi without resort to the Scarpa hearsay. Thus, any impeachment of Scarpa's statements would have been of no value to Zambardi. In Chief Judge Sifton's view, Zambardi was not seeking to withdraw his plea for any reason other than to try to bargain for an even more lenient sentence. After denial of his post-plea motion, Zambardi received a sentence that included a term of 15 years.

Fusco's guilty plea. Fusco was charged with substantive and conspiracy RICO violations, conspiracy to murder, loan-sharking conspiracy, using and carrying a firearm in connection with these crimes, and illegal possession of a firearm and ammunition by an ex-felon. If convicted on all counts at trial, he faced life imprisonment.

At the start of the trial in February 1994, Fusco requested and was granted a severance on the ground that he did not have the physical stamina to endure a trial; the severance came after repeated delays in the early stages of the trial due to Fusco's heart disease, hypertension, and other ailments. In May 1994, on the eve of his scheduled separate trial, Fusco tendered a plea of guilty to one substantive count of racketeering, pursuant to a plea agreement for a 14-year term of imprisonment.

At the plea allocution, Fusco informed the Court of his health problems. Chief Judge Sifton ascertained that the plea was knowing, intelligent, and voluntary, and supported by an adequate factual basis, but he nevertheless deferred decision on whether to accept the plea agreement and the plea. *See* Fed. R. Crim. P. 11(e)(2). After the Scarpa disclosures, Fusco moved to withdraw his guilty plea pursuant to Fed. R. Crim. P. 32(e), apparently treating it as if

it has been accepted. The Court denied the motion, reasoning that the information about Scarpa would not have affected impeachment of the potential witnesses against Fusco, exculpation of Fusco, or Fusco's plea itself. Fusco does not seek review of that decision.

After the plea, Fusco was under the care of the Bureau of Prisons Federal Medical Centers. Over the next three years, Fusco's health deteriorated; he was given a coronary triple bypass, and malignant cancer was discovered in one of his kidneys, which was subsequently removed. His doctors felt that the combination of these two ailments, combined with his severe hypertension (from which he had been suffering for decades), meant, as they reported, that "this man is virtually under a death sentence." One doctor also wrote, "I would not be very sanguine about his surviving fourteen years incarcerated in a general prison." *Id.* Fusco was incarcerated in various federal prison hospitals for about five years; throughout the period, the Court had neither accepted nor rejected the plea agreement or the plea.

In November 1997, Fusco moved, purportedly pursuant to Rule 32(e), to reject the plea agreement. He hoped that the Court would reject the plea agreement and, in view of the defendant's diminished life expectancy, impose less than the bargained-for sentence. Fusco's counsel argued that under the provisions of Rule 11(e)(1)(C), plea withdrawal was the only way to achieve a sentence of less than 14 years, which was not only the agreed-upon sentence but also the low end of the applicable range under the Sentencing Guidelines. Chief Judge Sifton asked the parties and the Department of Probation to prepare proposed Guidelines analyses, without taking into account Fusco's health problems, to aid in deciding whether to accept or reject the plea agreement. *See* Fed. R. Crim. P. 11(e)(2) ("[T]he court may . . . defer its decision . . . until there has been an opportunity to consider the presentence report."). The

analyses submitted by Fusco, the Government, and the Probation Department were not in agreement.

On December 17, 1997, Chief Judge Sifton announced that he would adopt the Probation Department's Guidelines analysis, which reflected the highest offense level of the three proposals. He further stated that he would treat the defendant's "Rule 32(e) plea withdrawal motion" as a motion for a downward departure and that if the defendant presented a valid reason to depart below the applicable Guidelines range, he would then reject the plea agreement. In response, Fusco's counsel described the deterioration in Fusco's health, and argued that his circumstances had materially changed since he had tendered his guilty plea.

The Government responded that Fusco had not established any extraordinary medical conditions to warrant entitlement to a departure. In the Government's view, the only relevant fact for departure purposes was that the medical staff of the Bureau of Prisons was able to provide adequate care for Fusco. Chief Judge Sifton agreed with the Government's approach. Analyzing the issue solely as a request for a departure, rather than as an effort to meet Rule 32(e)'s requirement of "any fair and just reason" for presentence withdrawal of a plea, he said, "I find myself unable to depart from the low end of the guidelines that apply. Accordingly, I am accepting the plea agreement and sentencing the defendant to the custody of the Attorney General . . . for a period of 168 months [14 years] . . . ."

Discussion

[Sections not relevant omitted]

V. Fusco's Purported "Plea Withdrawal"

The Government and Fusco disagree on what relief Fusco sought in the District Court concerning his plea. Fusco contends that he sought to withdraw his plea. The Government contends that Fusco sought only a departure from the sentence that had been agreed upon in the plea bargain. We conclude that Fusco was not moving for a plea withdrawal, but only for a more lenient sentence.

The plea and the plea agreement had not yet been accepted when Fusco made his application. A Rule 32(e) plea withdrawal motion was technically not available. What Fusco sought in reality was to retain the benefits of his plea agreement, urge its acceptance, and simultaneously renegotiate the length of the previously bargained-for sentence. The task for Chief Judge Sifton was to consider whether to accept the plea agreement and the plea, and he properly turned to that task. In response to Fusco's argument, Chief Judge Sifton stated:

> [T]he only reason I would reject this plea is because, given the guidelines that exist, I feel it is appropriate to depart from those guidelines in imposing a more lenient sentence. And if I reach that conclusion, then I will reject the plea agreement.

However, Chief Judge Sifton declined to make a departure and therefore accepted the plea and imposed sentence. Moreover, it would have made no sense for Fusco to withdraw his plea, since, in light of the Government's opposition to a departure downward from the agreed-upon 14-year sentence, he would have faced trial on all five counts of the indictment.

Thus, the only real issue raised is whether the trial court applied the correct standard to Fusco's request for a "departure" from the bargained-for sentence of the plea

agreement. Even if we assume, for the argument, that the denial of a sentence departure, urged as a reason for modifying a plea agreement, may be reviewed on appeal, Chief Judge Sifton acted well within his discretion. The standards for a downward departure on medical grounds are strict, *see* U.S.S.G. § 5H1.4; *United States v. Altman*, 48 F.3d 96, 104 (2d Cir. 1995) (holding that "extraordinary physical impairment" required by guideline for downward departure requires medical conditions that Bureau of Prisons is unable to accommodate). The plea agreement was properly accepted, and the sentence properly imposed.

Conclusion

The judgments of the District Court and the denial of post-judgment motions are affirmed in all respects.

APPENDIX B
[Order Denying Rehearing]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL, CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 6th day of April, one thousand nine hundred and ninety-nine.

USA

Appellee,

v. Dkt. No: 97-1456

Orena, et al.

Defendants-appellants.

A petition for rehearing and a petition for rehearing en banc having been filed herein by the appellant, Theodore Persico.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
CAROLYN CLARK CAMPBELL, Clerk
By: _____ (signed)
Beth J. Meador,
Administrative Attorney